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NTSB Order No. EA-3622

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of July, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-10230

v.

FRANKLIN J. RENO,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on February 14, 1990, following an evidentiary hearing.[1] We deny the appeal.

The Administrator's order charged respondent with violating § § 61.87(d), and 61.93(c)(2) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 61).[2] Respondent was also

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]At the time (January 1989), § § 61.87(d) and 61.93(c)(2)

charged with violating § § 91.90(b)(1)(i) and 91.9. The Administrator proposed to suspend his private pilot certificate, and any other pilot certificate held by him, for 120 days.[3] The Part 91 violations stemmed from an allegedly unauthorized Terminal Control Area ("TCA") incursion. At the hearing, respondent's answer was amended to admit this allegation. The Administrator then withdrew the Part 91 charges, and reduced the proposed certificate suspension (now based only on violations of Part 61) to 20 days.[4]

(..continued)
read, in pertinent part, as follows:

> § 61.87(d) Flight instructor endorsements. A student pilot may not operate an aircraft in solo flight unless his student pilot certificate is endorsed, and unless within the preceding 90 days his pilot logbook has been endorsed, by an authorized flight instructor who . . . .
>
> § 61.93(c) Flight instructor endorsements. A student pilot must have the following endorsements from an authorized flight instructor:
> * * * * * *
>
> (2) An endorsement in his pilot logbook that the instructor has reviewed the preflight planning and preparation for each solo cross-country flight, and he is prepared to make the flight safely under the known circumstances and the conditions listed by the instructor in the logbook. . . .

[3]At the time of the incidents, respondent had a student pilot certificate. The parties stipulated that, thereafter, respondent obtained his private pilot certificate and his commercial pilot certificate.

[4]Tr. at 11, 15. Because respondent had filed an Aviation Safety Reporting Program report on the TCA violation, the proposed sanction contained no penalty related to it. The reduction in penalty in the amended complaint was the result of discussions between counsel concerning the circumstances of the

The Part 61 allegations arose as a result of various omissions in respondent's logbook and student pilot certificate. The latter contained no endorsement by the flight instructor that respondent was qualified to fly solo flights in a Cessna Model 152, yet there is no dispute that he did so on numerous occasions between April 29, 1988 and August 19, 1988. Respondent's logbook also failed to contain required information. Specifically, it had no current endorsement for solo flights that were made between July 29, 1988 and August 19, 1988 in the Cessna 152; and entries for two cross-country flights had no logbook endorsement by the flight instructor that he had reviewed the preflight planning and preparation.

The parties agree, and the law judge found (Tr. at 64, 69, 87), that aviation safety was not implicated by respondent's omissions. The law judge took this into account in reducing the sanction to a 10-day suspension.[5]

On appeal, respondent continues to contest the validity of any sanction, and offers seven criticisms of the law judge's initial decision (each of which is discussed below). For the reasons that follow, we reject respondent's claims.

1. Was the jurisdiction of the Court exceeded by rendering a decision and upholding the Administrator's Order of Suspension when safety in air commerce or transportation was not compromised?

(..continued)
remaining Part 61 counts in the complaint.

[5]The Administrator did not appeal this or any other aspect of the law judge's decision.

Because the Administrator's witness stated that safety was not implicated by respondent's recordkeeping errors, and the law judge so found, respondent concludes that the Board (i.e., the law judge) had no authority to affirm the Administrator's order. Respondent reasons that the Board therefore could not find, as required, that safety in air commerce or air transportation and the public interest require affirmation of that order.

As the Administrator points out (Reply at 11), jurisdiction is not conferred or removed in hindsight, based on findings of fact. Respondent confuses issues of general public safety and issues of proof in a particular case. That a particular action or inaction is found not adversely to affect the safety of persons or property does not undermine the Administrator's finding that a certain category of action (or inaction) could compromise safety and, therefore, should be prohibited and sanctioned. Likewise, such a finding in a particular case does not affect the Administrator's authority to enforce his rules, or the Board's jurisdiction to review his actions.

Respondent does not suggest that the intent of the instant rules is misguided, or that compliance with them would have no impact on aviation safety. Safety in air commerce and air transportation and the public interest could require certificate suspension even though, in a particular case, no threat to aviation safety was established. Indeed, we have stated:

> Proper endorsement of all prescribed documents is a legitimate regulatory requirement whose purpose is to give

> notice to all concerned parties, such as FAA inspectors, that the airman is qualified for the operation in which he is engaged.

Administrator v. Slotten, 2 NTSB 2503, 2505 (1976), footnote omitted.[6] That accurate recordkeeping is critical to the FAA's safety enforcement program and, therefore, required by the public interest and safety in air commerce and air transportation cannot seriously be questioned. Respondent failed in his recordkeeping duty under the FAR; the Administrator brought enforcement action; and adjudication of respondent's appeal is properly before this Board. That no harm was done as a result of respondent's failure is a boon, not a ground for dismissal.

2. Was Mr. Reno's right to due process violated by having his Commercial Pilot Certificate suspended for a paperwork entry on his Student Pilot Certificate?[7]

Respondent contends he will be prejudiced by a violation against his commercial pilot certificate, when the violations occurred when he was a novice in aviation. This is not a new issue for the Board. It is not atypical for respondents to have upgraded their certificates between the date of the incident

[6]It is also useful to note that, in Slotten, we rejected a claim by respondent that the failure to endorse a student pilot certificate was a "mere technicality" or "harmless oversight." Here, respondent suggested the same argument in claiming that other records demonstrated compliance with the underlying substantive requirement, and that the endorsement for this type aircraft was in the logbook, rather than on the certificate, as required.

[7]The suspension in this case was based on lack of entries on both the student pilot certificate and the pilot logbook, not just on the certificate, as respondent's question suggests.

giving rise to the complaint and its adjudication.[8] As we said in Administrator v. Bridges, 1 NTSB 1500, 1501 (1972):

> [S]uspensions are primarily disciplinary in nature and designed to deter respondent and other pilots from committing similar violations.

A sanction imposed against respondent's student pilot certificate would be meaningless, as he no longer operates under that authority. Such a sanction would allow him to continue to operate as a pilot during the suspension period. That is no sanction at all.[9]

Respondent, in citing Administrator v. Smith,[10] and an FAA order directing that enforcement actions be timely completed, suggests that his ability to obtain an upgraded certificate before adjudication of this matter proves that he was denied due process. Although respondent does not discuss how either Smith or FAA Order 1000.9 is relevant, we reject such an inference, either in general or as applied to this case. Moreover, we note

[8]As the Administrator notes, this possibility is reflected in the order of suspension itself, by reference to suspension of "any other airman certificate held by you."

[9]In Bridges, we also reasoned that airman certificates were cumulative, each building on the former. Sanction against a former certificate would produce the incongruous result of prohibiting respondent from exercising the privileges associated with a lower degree certificate, but allow him to exercise the privileges of a higher level certificate requiring greater experience and qualifications. Id. at 1501-2.

[10]1 NTSB 1080 (1970).

that the order of suspension here was issued only a few months after the latest claimed violation.[11]

3. Does Federal Aviation Regulation 61.51 mean that a Pilot Log Book is required and that the "reliable record" statement in the regulation means a reliable entry in that Pilot Log Book as interpreted by Judge Davis?

The law judge rejected respondent's contention that the necessary records of training and experience need not be in the form of a logbook, but could be in some other form of "reliable record."[12] We agree with the law judge.

There is no debate that § 61.51 allows use of logbook alternatives.[13] However, there is no basis for respondent's conclusion that § § 61.87(d) and 61.93(c)(2) do as well. Neither of these two regulations use the phrase "reliable record." We agree with the Administrator that, under the plain meaning of § § 61.87(d) and 61.93(c)(2), these rules specifically require endorsements in "pilot logbooks." The Administrator has authority to require different types of records in different contexts. That in Administrator v. Hawkins, 3 NTSB 2486 (1980),

[11]Respondent ignores our stale complaint rule at 49 C.F.R. 821.33, which established criteria to address due process concerns raised by delayed enforcement action.

[12]Respondent had other training records confirming that the substantive requirements for solo and solo cross-country flight had been met. Thus, under respondent's theory, these other records would constitute a "reliable record," logbook entries would not be necessary, and, therefore, their absence would not violate the FAR.

[13]In addition to § 61.51, respondent cites § 61.39, also authorizing use of reliable records.

we applied the "reliable record" standard to a case brought under § 61.51 offers no support to respondent in this case.

4. Does an endorsement for solo cross-country flight incorporate the lesser requirement for a solo endorsement?

Respondent's certificate contained an endorsement for solo cross-country flights in the Cessna 152. (For solo flights, the endorsement was for a Cessna 172, not a 152.) Respondent suggests it is illogical not to subsume the latter into the former, as competency in solo flight would be critical to allowing a solo cross-country flight.

Respondent's argument, however, ignores the different requirements of solo and cross-country flying testified to by the Administrator's witness. And, we do not second-guess the policy decisions that are reflected in the regulations promulgated by the Administrator. See, e.g., Administrator v. ConnAire, NTSB Order EA-2716 (1988). Thus, that the FAR requires separate endorsements for solo and cross-country flight is not an issue we will review.

Respondent had no endorsement on his certificate for solo flights in a Cessna 152, nor did he have current endorsements in his logbook for all solo flights, thus violating § 61.87(d). He also had no endorsements showing that his cross-country flight plans had been reviewed by his instructor, thus violating § 61.93(c)(2).

5. Did the Administrator violate the FAA's own enforcement policy by taking actions only for punitive reasons?

6. Did FAA attorney, Mr. White, mislead the Court when he stated in closing arguments (TR 94) that there is no such statement in the FAA's policies, handbooks, or anything else that says we should not take sanctions only for punitive reasons and continued that they (the FAA) have been doing this for many, many years?

Respondent argues that, if his conduct raised no safety concern, punishment must have been the only purpose of the Administrator's action against him. He then notes that FAA Order 1000.9(E) prohibits enforcement action "for the sake of punishment alone." The Administrator, in reply, does not disagree with this statement of enforcement policy.

In his closing, counsel for the Administrator stated (Tr. at 94), however, that:

> There's no such statement in our policies, handbooks, or anything else that says we should not take sanctions only for punitive reasons. We've been doing this for many, many years. All these cases have been trying, the sanctions that have been imposed have been for punitive, unless there's a question of qualifications, and that's another story.

Although we deplore counsel's ill-thought and erroneous comments, we decline to overturn the law judge's decision on the basis of this statement and respondent's theories.

There is no logic to respondent's contention that, because there was no harm from his omissions here, the complaint must be punitive and, therefore, prohibited. As we noted in connection with (2) above, deterrence is a significant goal behind the FAA's safety enforcement policy. Bridges, supra, and Hill v. NTSB et al., 886 F.2d 1275, 1280 (10th Cir. 1989) (sanctions serve important disciplinary purpose through deterring future unsafe

conduct). The FAA's ability to enforce its safety policy is, in great part, dependent on accurate recordkeeping by all participants. Regardless of whether respondent's conduct compromised safety, we think the odds are substantially greater now than before this action was brought that respondent will keep accurate records in the form required by the FAR. The action also alerts other pilots to the importance of this recordkeeping. Thus, the goal of deterrence is served.

Respondent also offers nothing specific to support his claim that this action was brought for punitive reasons only. We will not make such a finding without proof. Counsel White's statements do not constitute such proof (respondent does not claim otherwise). In the absence of any showing that this complaint was brought for purely punitive reasons, we decline to dismiss on the basis suggested.[14]

Respondent also does not identify any specific error in the law judge's decision caused by Mr. White's statement. Although this statement contains an error of fact, we cannot see, nor has respondent identified, any adverse effect this statement may have had on the law judge's analysis. The law judge shows no

[14]Much of the Administrator's response -- that the Board has refrained from reviewing the Administrator's enforcement programs -- while correct, is inapplicable here. The heart of respondent's claim is that the Administrator is not applying his policies consistently. Reviewing the merits of a particular program is far different from determining whether the Administrator has complied with his own policies, as we did, for example, in Administrator v. Brasher, 5 NTSB 2116 (1987).

indication he relied on this information. Indeed, he reduced the suspension by half, making a number of findings favorable to respondent.

Respondent further suggests that suspension, as opposed to a warning, for example, is an inappropriately severe sanction inconsistent with the language of FAA Order 1000.9(D) and (E). However, he does not expand on this claim by way of comparisons to specific cases. Not only is the cited language not inconsistent with the action taken here, we do not see a 10-day suspension as inappropriately severe in this case.

7. Can a student pilot rely on his flight instructor to fulfill the flight instructor's responsibility for endorsements to the Student Pilot Certificate and Log Book?

In this last claim of error, respondent offers two theories to excuse his recordkeeping failure. First, he suggests that principles of reasonable reliance apply, citing Administrator v. Thomas, 3 NTSB 349 (1977). Second, he contends that a 1967 amendment to flight instructor rules placed the recordkeeping burden on the instructor, not the student. We disagree with both arguments.

As the Administrator notes (Reply at 22), neither the Federal Register discussion of an amendment to rules pertaining only to flight instructors or the amendment itself offers any basis to absolve the student pilot of his obligations under other rules, here Part 61 subsections 87(d) and 93(c)(2). Section 61.87(d) provides that the student pilot may not operate an

aircraft in solo flight without the flight instructor's endorsement. Clearly, this places an obligation on the student pilot to obtain it. Section 61.93(c)(2) is even more direct. It requires that the student pilot have an endorsement in his pilot logbook that the instructor has reviewed his planning for each solo cross-country flight. That both parties have this recordkeeping obligation merely underlines its importance to the FAA.

Respondent's application of Thomas to the case before us misconstrues the principle of reasonable reliance employed there. Thomas, in any case, is not especially useful. It involved a special circumstance not existing here -- the pilot-in-command ("PIC") relied on misunderstood radio instructions that he had not personally heard.[15] We recently reviewed principles of reliance in Administrator v. Fay & Takacs, NTSB Order EA-3501 (1992). We noted there (slip op. at 9, citation omitted):

> As a general rule, the pilot-in-command is responsible for the overall safe operation of the aircraft. If, however, a particular task is the responsibility of another, if the PIC has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then

[15]Respondent attempts to rely on Thomas, but at the same time rejects the analogy by stating that the pilot-in-command is best likened here not to the student pilot but to the flight instructor. This would moot the relevance of the vast majority of reliance cases, which involve whether the PIC (here, flight instructor under respondent's theory) should be held responsible for actions of another, such as the first officer (read, student pilot). Respondent cites no cases that involved the converse. See, e.g., Administrator v. Babbitt, 1 NTSB 1305, 1307 (1971) (resolved on other grounds).

and only then will no violation be found.

Thus, even were the student/instructor relationship comparable to that of the first officer/pilot-in-command, Fay makes clear that respondent may not here rely on the instructor's obligation if only because, as discussed above, the responsibility was not solely that of the instructor. The two regulations imposed on respondent an independent duty to obtain necessary endorsements prior to flight.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The 10-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[16]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[16]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).